

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
BRIEF**

75-1187

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

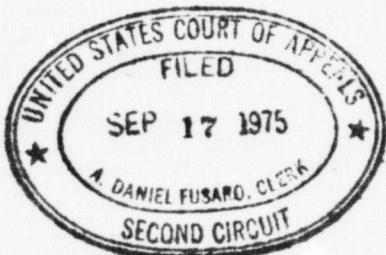
-against-

SID COHEN,

Appellant.

-----x
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S INDEX



JOSEPH T. KLEMPNER
Attorney for Appellant
Office & P. O. Address
401 Broadway
New York, New York 10013

TABLE OF CONTENTS

Docket entries	page A1
Charge of the Court	page A5

JUDGE BONSAL

74 CRIM. 25

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.:

vs.

Daniel J. Beller, AUSA,
264-6291

SID COHEN-1

JESSE PHILLIPS-1

MARVIN GELBER-1&2

BENNY SCHWARTZ, a/k/a Benny Siegel-1&2

For Defendant:

(2) Martin Geduldig
260-09 Hillside Ave
Floral Park, N.Y.
Tel: 347-4355(4) Salvatore J. Iannucci
401 B'way, NYC 10013 Ca6-426(3) H. Elliot Wales, 747 3rd Ave
NYC tele: 421-1993(1) Joseph Klempner, 401 Bway
NYC tele: 925-3177

CASH RECEIVED AND DISBURSED

ABSTRACT OF COSTS	AMOUNT	DATE	NAME	RECEIVED	DISBURSED
		4/22/75	Keller	250	-
		4/24/75		250	-
		5/22/75	Gelber	250	-
		5/27/75		250	-
		6/23/75	Geller	250	-
		6/24/75	Iannucci	250	-
		5/5/75	Klempner	5	-
		5/6/75	Iannucci	5	-
(Two Counts)					

PROCEEDINGS

DATE	PROCEEDINGS
-19-74	Filed indictment.
7-29-74	Defts. (attys. present) Plead not guilty. Motions returnable in 10 days. Ordered photographed and fingerprinted. Released on their own recognizance. Case assigned to Judge Bonsal for all purposes. Stewart, J.
8-14-74	Filed deft's Marvin Gelber affidavit & notice of motion for discovery, & inspection ret. before Bonsal, J.
8-14-74	Filed deft's Marvin Gelber affidavit & notice of motion to suppress evidence seized.
8-14-74	Filed deft's Marvin Gelber affidavit & notice of motion for bill of particulars-Rule 7.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFEND.
8-14-74	Filed deft. Marvin Gelber affidavit & notice of motion to suppress admission & or confession.		
7/30/74	B. Schwartz- filed notice of appearance by atty. (see front)		
7/30/74	M. Geiber- filed notice of appearance by atty. (see front)		
7/30/74	S. Cohen- filed notice of appearance by atty. (see front)		
9/6/74	Filed deft. Jessie Phillips omnibus motion to dismiss indictment, severance of deft., discovery and inspection and bill of particulars: 9/12/74.		
9/18/74	Filed notice of appearance of atty for deft. Jessie Phillips.		
9/17/74	Filed deft. Gelber's reply memo. of law re: appl. to suppress.		
10/25/74	Filed deft. Sid Cohen's notice of motions re: suppression, production and discovery of a bill of lading ret: 11/19/74.		
10/30/74	Filed Govt.'s affdvt. in opposition to counsel for deft. Cohen's motion to suppress.		
10/30/74	Filed Govt.'s voir dire.		
11/1/74	Filed Govt's memo. of law in opposition to deft. Cohen's motion to suppress.		
11/14/74	B. Schwartz- filed notice of appearance of atty. (see atty. list)		
11/15/74	Filed Govt.'s request to charge.		
12/3/74	Filed transcript of proceedings dated 11/14/74.		
12/11/74	Mr. Marvin Gelber (atty. present) present pleads guilty to charge. Pre-sentence report ordered. Deft. released on own recognizance for sentence. Bonsal, J.		

1/16/74 Deft. B. Schwartz (atty. present) filed motion for a new trial. Pre-sentence report ordered. Deft. released on own recognizance.

6/74 Deft. B. Schwartz- filed an affidavit.

6/74 Deft. M. Gelber- filed acknowledgement of service of process.

7/5 Filed affdvt. of Sid Cohen re: support of motion to suppress statements.

7/5 BENNY SCHWARTZ (atty. present) Filed JUDGMENT the deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of THREE (3) YEARS on count 1 pursuant to Sec. 3651 of T. 13, U.S. Code, as amended, with provision that the deft. be confined in a JAIL TYPE institution for a period of SIX (6) MONTHS as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and the deft. is placed on probation for a period of FOUR and ONE-HALF (4 1/2) YEARS, to commence upon expiration of confinement, subject to the standing probation order of this Court. Count 2 is dismissed on motion of deft.'s counsel with consent of the Govt. Deft. is cont'd on his own recognizance until 2/13/75 at which time he is to surrender for service of sentence. Bonsal, J. issued all copies.

7/5 Filed transcripts of record of proceedings. Dated 2/16/74

8-75 Benny Schwartz Filed delivered to Clerk of the
Court of Circuit C.C. 2-18-75.

1-75 MARVIN GELBER - (atty. present) Filed JUDGMENT deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a TWO (2) YEARS on count 1. Execution of prison sentence is suspended. Deft. is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. AND deft. is FINED \$1,000. on count 1. Fine is to be paid within SIX (6) MONTHS. Count 2 is dismissed on motion of deft.'s counsel with consent of the govt. Bonsal, J. issued all copies.

3-75 ALL DEFTS- Filed magistrate's orig. papers: (1) docket entry sheet (2) criminal complaint (3) magistrate's warrant (4) disposition (5) appointment of counsel (6) notice of appearance.

3-75 Jury trial begun before Judge Bonsal re: defts. Cohen, Phillips as to count 1.

9-75 Trial cont'd.

0-75 Trial cont'd.

1-75 Trial cont'd. Jury verdict deft. Cohen guilty 4-23-75 set for sentence. Pre-sentence report ordered. Deft. released on own recognizance. Deft. Phillips acquitted. Bonsal, J.

-75 Filed documents for deft. Phillips dated 1-31-75.

DATE	PROCEEDINGS	Date Or Judgment
03-27-75	J. Phillips- filed CJA 20 approval for payment for fees of atty. issued all copies. Bonsal, J.	
04-17-75	J. Phillips- filed CJA 21 appointment of Kennedy & Brinner Assoc, Inc. Bonsal, J. mailed copies CJA clerk.	
04-17-75	J. Phillips- filed CJA 21 approval for payment of fees of atty. Bonsal, J. mailed copies CJA Clerk.	
4-22-75	Filed transcript of record of proceedings, dated 2-20-75.	
4-28-75	SID COHEN (atty, present) deft. committed to the custody of the Atty. Gen'l. for imprisonment for a period of TWO (2) YEARS. Execution of sentence is suspended. Deft. is placed on pro- bation for a period of FOUR (4) YEARS, subject to the standing probation order of this Court. Special condition of probation being the deft. is to receive any psychiatric treatment that may be directed by his Probation Officer. Bonsal, J. issued all copies.	
5-05-75	Filed deft. Sid Cohen's notice of appeal from judgment of 4-28-75. Mailed copies.	
5-28-75	Filed transcript of record of proceedings, dated 3/19/75	
6-02-75	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.	
5-05-75	Filed trial transcripts of record of proceedings dated, Mar. 18, 1975.	
6-05-75	Filed suppl. notice that the record on appeal has been certified and transmitted to the U.S.C.A.	
7-3-75	Filed transcript of record of proceedings, dated 7-14-74.	
7-14-75	S. Cohen- filed CJA 20 approval for payment of fees of J. Klempner Esq. Bonsal, J. issued copies CJA Clerk.	
7-22-75	M. Gelber- fine marked satisfied and entered in money judgment book.	
7-28-75	Filed transcript of record of proceedings, dated Mar. 18, 19, 20, 21, 1975.	
9-08-75	Filed suppl. notice that the record on appeal has been certified and transmitted to the U.S.C.A.	

1 rgcg

2 UNITED STATES OF AMERICA, :
3 :
4 vs. : 74 Cr. 725
5 :
6 SID COHEN, JESSE PHILLIPS, :
7 :
8 :
9 :
10 :
11 :
12 :
13 :
14 :
15 :
16 :
17 :
18 :
19 :
20 :
21 :
22 :
23 :
24 :
25 :
----- x

New York, N. Y.
March 21, 1975

7 (Trial resumed, jury present.)
8
9 (In open court.)

10 CHARGE OF THE COURT

11 THE COURT: Good morning, ladies and gentlemen.
12 It is nice to see you this morning.

13 THE CLERK: The Court will now charge the jury.
14 The spectators will remain seated during the charge or may
15 leave immediately. Lock the door, Marshall.

16 THE COURT: Mr. Foreman -- Mr. Baily, by right
17 you are the foreman by occupying the first chair -- and
18 ladies and gentlemen of the jury.

19 First I would like to join with the lawyers in
20 thanking each of you for the care and attention which you
21 have shown throughout this short trial and to tell you that I
22 appreciate the sacrifices I know each of you has been called
23 upon to make in your own personal lives so that you could
24 serve in this very important public capacity of being on a
25 federal jury and I am sure you will give me the same degree

1 rqcg 2

2 of attention that you have shown throughout so that you may
3 understand the principals of law which apply to this case.

4 You remember I told you at the time you were
5 selected that it was the duty of the jury to weigh the
6 evidence calmly and dispassionately without any sympathy and
7 without any prejudice for or against either of these two
8 defendants. I told you that everyone appearing before this
9 bar of justice is entitled to an absolutely fair and impartial
10 trial regardless of his occupation or his station in life.
11 I told you that your verdict must be based solely on the
12 testimony which you heard from that witness chair and on the
13 exhibits which were received during the trial and on nothing
14 else at all, and I also told you that it was my function to
15 set forth the rules of law which apply here and on that you
16 must accept my instructions, but you, the jury, are the sole
17 judges of the facts. It is not what a lawyer says a witness
18 testifies to or what a document may contain or shows, or what
19 I might say on these subjects, it is what you, the jury, remember
20 and decide.

21 I also told you at the outset that during the
22 trial you would observe me having conversations with one or
23 the other of the lawyers, and indeed I did. I sustained
24 objections. I overruled them. I told you to pay no attention
25 to all this and above all, ladies and gentlemen, draw no

1 rqcg 3

2 inference from anything that I said that might lead you to
3 think that I favor one side or the other here, because of
4 course I do not. That is not my task, that is yours.

5 Now, throughout my charge, ladies and gentlemen,
6 I will instruct you that you may not convict either of these
7 defendants unless and until you are satisfied that the govern-
8 ment has proven each element comprising the crime charged
9 beyond a reasonable doubt. What do we mean by beyond a
10 reasonable doubt? The word, of course, suggests the answer.
11 It is a doubt based on reason. It is a doubt which a reason-
12 able man or woman might entertain, but a reasonable doubt is
13 not a fanciful doubt, it is not an imagined doubt, it is not
14 a doubt that a juror might conjure up in order to avoid
15 performing an unpleasant task. It is a reasonable doubt.
16 It is a doubt which arises in a jurors' mind because of
17 something in the evidence in the case or the absence of
18 evidence in the case. It is the kind of doubt which would
19 cause a reasonable man or woman in a more serious and important
20 matter in his or her life to hesitate to act and the govern-
21 ment has the burden of proving the guilt of a defendant
22 beyond a reasonable doubt.

23 Now, the government need not prove a defendant's
24 guilt beyond all possible doubt, because if that were the
25 rule few people, however guilty they might be, would ever be

1 rgcq 4

2 convicted. In this world of ours it is practically impossible
3 for one to be absolutely and completely convinced of any
4 controverted fact which by its nature is not susceptible to
5 mathematical precision or to mathematical certainty, so the
6 law is that the government must prove a defendant's guilt
7 beyond a reasonable doubt, not beyond all possible doubt.

8 When I refer to the indictment, ladies and
9 gentlemen, remember as I told you at the outset that the
10 indictment is merely the charge, the way the government
11 brings into court individuals who it claims had violated the
12 law, and I told you that the indictment is not evidence of the
13 guilt of either of these defendants nor does it detract in
14 any way from the presumption of innocence with which the law
15 surrounds each of these defendants until his guilt is proven.
16 This presumption of innocence remains with both these defen-
17 dants throughout the trial and applies to the consideration of
18 each of the essential elements of the crime charged. This
19 presumption of innocence continues unless and until you, the
20 jury, should find that a defendant is guilty as charged.

21 Each of these defendants has plead not guilty
22 to the indictment and by doing so he has put in issue every
23 material element of the crime charged and the government must
24 prove these elements beyond a reasonable doubt. This burden
25 has remained on the government throughout the trial and if the

1 rgcg 5

2 government has not proved to you that a defendant is guilty
3 beyond a reasonable doubt, then of course you would find
4 that defendant not guilty.

5 Bear in mind, ladies and gentlemen, that there
6 are two defendants here. They are charged as two separate
7 individuals and the guilt or innocence of each of them must
8 be passed upon by you separately. Guilt or innocence is a
9 personal thing and each of these defendants, Mr. Cohen and
10 Mr. Phillips, has the right to the same consideration on your
11 part as if they were being tried alone.

12 Now, ladies and gentlemen, this has been a very
13 short trial and yesterday afternoon you heard the evidence
14 marshalled for you in considerable detail by the lawyers.
15 I don't intend to review it again, but it may be helpful if
16 I indicate a few of the contentions of the parties as I under-
17 stand them. It doesn't mean I am reviewing all the conten-
18 tions, because I am not, and I am doing so merely in order to
19 help you refresh your recollection because, after all, it is
20 what you recall and decide that matters.

21 As I recall it the government contends on the
22 basis of Gelber's testimony that Gelber had an arrangement
23 with the defendants, Cohen and Phillips, to receive stolen
24 merchandise from them and to pay them 25 percent of the value
25 and Gelber testified that he had received stolen merchandise

1 rgcg 6

2 and made payments to Cohen and Phillips on several occasions
3 prior to April 24, 1974.

4 Then the government contends on the basis of
5 McDowell's testimony that the defendant Cohen approached
6 McDowell, a fellow employee, with the proposition to sell
7 excess and unclaimed freight and to divide the proceeds between
8 them and that McDowell reported this to his supervisors,
9 Goldberg and Gaboff. As I recall it they asked McDowell to
10 appear to go along and for that purpose made five cartons
11 available to McDowell on April 24, 1974. You will remember
12 the testimony as to what happened to the five cartons on
13 April 24 from the time they left Jersey City until they ended
14 up at Triple Rose at 305 Seventh Avenue.

2 15 The government here is contending that the
16 delivery to Triple Rose was pursuant to this arrangement
17 between Gelber and the two defendants. The government con-
18 tends that Cohen and Phillips in taking the cartons from
19 McDowell and Cohen's trucks for delivery to Triple Rose stole
20 or knew that the cartons were stolen and that they were
21 delivered to Triple Rose under this arrangement with Gelber.

22 Now, the defendant Cohen denies the government's
23 contentions. The defendant Cohen denies he had any arrangement
24 with Gelber. He denies that he knew Gelber prior to April
25 24, 1974 and he denies that he ever made any deliveries to

1 rgcg 7

2 Triple Rose. He also denies that he ever approached McDowell
3 regarding the selling of excess freight.

4 You remember Mr. Cohen testified that on April
5 24 he transferred the five cartons from McDowell's truck to
6 his own so as to make the delivery as a favor to his co-
7 employee, McDowell, and that at that time he prepared what
8 they called a forced bill, as I recall it, from the information
9 which McDowell gave him and Cohen then instructed Phillips
10 to deliver the cartons to Triple Rose.

11 Cohen also testified that the statements he made
12 to the FBI and to the Assistant United States Attorney during
13 the course of the day were untrue. He said he was under a
14 good deal of pressure, he was worried about his wife and his
15 daughter and he said he would have signed any statement because
16 he had been told that if he didn't sign the statement he might
17 have to spend the night in jail, I think on high bail.

18 The defendant Phillips also denies the govern-
19 ment's contentions. He denies each and every one of them.
20 Phillips testified he was assigned by his supervisor as
21 Cohen's helper on April 24 and that he delivered the five
22 cartons to Triple Rose on Cohen's direction; that he obtained
23 a signed receipt from the clerk on the premises and that he
24 had it in his pocket until Mr. Lief met him as he was going
25 out of the building and took it away from him.

1 rgcq 8

2 Phillips denies any knowledge that the cartons
3 had been stolen. He also denies that he met or made previous
4 deliveries of merchandise to Gelber, though as I recall it he
5 said that he did make deliveries in that building from time to
6 time.

7 Now, ladies and gentlemen, the federal statute in-
8 volved here is Section 659 of Title 18 of the United States
9 Code which provides, to the extent relevant to this case,
10 whoever steals or unlawfully takes, carries away or conceals
11 by fraud or deception from any motor truck or other vehicle,
12 or from any depot, with intent to convert to his own use any
13 goods or chattels moving in an interstate shipment of freight
14 is guilty of a crime and whoever receives or has in his pos-
15 session any such goods, knowing the same to have been stolen,
16 is the guilty of the crime.

17 The indictment here reads, it is one count, and
18 I will remind you again that this indictment is merely the
19 charge and not evidence of the guilt of either of these
20 defendants. The indictment reads:

21 "The grand jury charges:

22 "On or about the 24th day of April, 1974, in the
23 Southern District of New York" -- and all this happened in
24 Manhattan, that is the Southern District of New York -- "Sid
25 Cohen, Jesse Phillips"-- and then there are two other names

1 rgcg 9

2 here, Marvin Gelber and Benny Schwartz, also known as Benny
3 Segal. Well, you have heard testimony about them, but
4 you are not here to consider them. You are only to consider
5 Sid Cohen and Jesse Phillips and please draw no inferences
6 either favorable or unfavorable with respect to Mr. Cohen and
7 Mr. Phillips by reason of the fact that these other names
8 appear in the indictment.

9 The indictment goes on to say "The defendants
10 unlawfully, willfully and knowingly did receive and have
11 in their possession goods and chattels of a value more than
12 \$100, to wit, five cartons of wearing apparel, knowing said
13 goods and chattels to have been embezzled and stolen, said
14 goods and chattels having been embezzled, stolen and unlaw-
15 fully carried away from a motor truck, vehicle, storage
16 facility, platform and depot while said goods and chattels
17 were moving as were part of and constituted an interstate
18 shipment of freight, express or other property."

19 I remind you again you will consider each of these
20 defendants separately and in order to find either of the
21 defendants guilty of the crime charged in the indictment the
22 government must prove to you beyond a reasonable doubt the
23 following elements as to each defendant.

24 First, that the goods, the five cartons of wearing
25 apparel were moving in interstate commerce. I don't think

2 there is any dispute here between the parties because you
3 will remember that the lawyers stipulated that if the proper
4 witnesses were called they would testify that these cartons
5 were moving as part of an interstate shipment. So much for
6 the first element.

7 The second element is that the value of the five
8 cartons was greater than \$100, and here again I don't think
9 there is any dispute between the parties because they stipu-
10 lated that if the proper witnesses were called they would
11 testify that the goods were worth more than \$100.

12 Third, that the five cartons of wearing apparel
13 were stolen from a motor truck or depot. Well, of course,
14 goods are stolen if they are taken unlawfully with the intent
15 to deprive the true owner of them. So here consider whether
16 these cartons were stolen. You may find that they were
17 stolen if you find that when the defendants took them from
18 McDowell's or Cohen's truck they knew that Gelber was not the
19 true owner; that they did so for the purpose of delivering the
20 cartons to Gelber under this arrangement as to which Gelber
21 testified.

22 Fourth, the government must prove that the
23 defendant you are considering had possession of the cartons,
24 knowing that they had been stolen. Well, all that possession
25 means, is that the defendant you are considering either had

1 rgcg 11

2 the cartons in his hands, that's actual possession, or had
3 control of the disposition of the cartons. As I recall the
4 evidence here the defendants, both defendants together, un-
5 loaded the cartons from Cohen's truck, placed them on a hand-
6 truck and then Phillips took them to Triple Rose, being
7 Gelber's premises. Here the government contends, and each
8 of the defendants denies, that in so unloading the cartons
9 and delivering them to Triple Rose the defendants intended to
10 dispose of the goods to Gelber under this prior arrangement
11 under which they would get 25 percent. Here in connection
12 with this element you must find that at the time that the
13 defendant you are considering, whether it is Cohen or Phillips,
14 had possession of the carton, that he knew that they were
15 actually being stolen at the time or had been stolen. He
16 need not have known that the cartons were being stolen from
17 an interstate shipment, but he must have known that they
18 were being or had been stolen.

19 Also as I understand it, ladies and gentlemen,
20 the government is contending that the defendant Phillips aided
21 and abetted the defendant Cohen in possessing and receiving
22 the stolen cartons of wearing apparel, so with respect to
23 Phillips and aiding and abetting there is another federal
24 statute which you should consider which is Section 2 of Title
25 18 of the United States Code and which provides to the extent

1 rgcg 12

2 relevant that whoever commits an offense against the United
3 States or aids and abets in its commission is punishable
4 as a principal.

3 5 Aiding and abetting means just to assist, to help,
6 and all this means if one assists another in the commission
7 of a crime he is equally guilty of that crime. Before you may
8 find the defendant Phillips guilty of aiding and abetting
9 Cohen you must find that the government has proved beyond a
10 reasonable doubt that Phillips knew that the purpose of the
11 venture was to take possession of the five cartons he knew
12 to be stolen and to dispose of them to Triple Rose or Gelber
13 and shared the money which Gelber would pay for the goods;
14 that he knowingly helped Cohen by delivering the cartons to
15 Triple Rose and it is not enough here that Phillips may have
16 known that Cohen was disposing of stolen merchandise or may
17 have been present when he did. Here to find that Phillips
18 aided and abetted you must find that he knowingly and willingly
19 participated with Cohen in the possession and disposition
20 of the five cartons; that he sought to make the venture his
21 own; that he had a stake, financial or otherwise.

22 Now, you will observe that one essential element
23 here, ladies and gentlemen, is the knowledge and intent of the
24 defendants you are considering. The indictment charges here
25 that each of these defendants was acting willfully, knowingly,

1 rgeg 13

2 and unlawfully; that he had a criminal intent in doing what
3 he did. Well, how do you determine this? Of course an
4 act is done knowingly and willingly if it is done voluntarily
5 and purposely and an act is done willfully, knowingly and
6 unlawfully if it is done with an evil motive or purpose, such
7 as violating the law, but an act is not done willfully,
8 knowingly and unlawfully if it is done by mistake or by
9 carelessness or by other innocent reasons. Obviously we
10 can't prove exactly what a defendant knew or what his inten-
11 tions were on April 24. We can't look into his mind an..
12 see what knowledge he had at that time to determine his
13 specific intentions, but these are matters which you, the
14 jury, will determine from a careful consideration of the
15 facts and circumstances as to which you heard evidence.
16 The knowledge and intentions on the part of a defendant may
17 only be understood when put in the context of the circum-
18 stances surrounding his acts and inferences which you, the
19 jury, find may be reasonably drawn therefrom.

20 You might ask yourselves whether these trans-
21 actions were normal or abnormal, whether you think they were
22 open or surreptitious, whether you think the background of
23 the defendant made it likely or unlikely that he understood
24 what he was doing, whether the defendant had a motive, whether
25 he had a financial or other interest in the outcome. These

1 rgcq 14

2 are the kinds of questions, and of course they are not the
3 only ones that you should ask yourselves in order to determine
4 the knowledge and intentions of the defendants you are con-
5 sidering, whether he had the criminal intent.

6 Of course I don't suggest any answers to these
7 questions. In your own daily affairs, or in your own daily
8 lives you are continually called upon to use your own common
9 sense and experience to determine from the actions and
10 statements of others what their real intentions are, and
11 please do that here with respect to these defendants.

12 Now, as I recall it Gelber testified that Cohen
13 and Phillips had previously brought stolen goods to him and
14 that he had an arrangement with them to pay them 25 percent
15 of the value of the goods. Of course each of the defendants
16 denies this. So here you may consider Gelber's testimony,
17 but only consider it. These prior deliveries are not
18 charged in this indictment. So you would only consider the
19 evidence as to these prior deliveries if you believe Gelber
20 in connection with the knowledge and intent, criminal intent
21 of the defendants with respect to the charge made as to what
22 they did on April 24.

23 Another thing applying to knowledge and intent,
24 and this applies with respect to Mr. Phillips, you remember
25 that Lief, the private detective, testified that when he

1 r-cq 15

2 stopped Phillips and Phillips was leaving the building, that
3 Phillips first denied having delivered any cartons and then
4 told him it was the 13th, the 14th floor and he finally got
5 around to the 16th floor and then Agent Kelly testified
6 that Phillips and denied having ever been to Triple Rose or
7 Gelber's premises prior to April 24, 1974.

8 The government contends, and of course the
9 defendant Phillips denies, that some of these statements
10 were false and that Phillips made these statements to
11 exculpate himself, to lead Lief off the track. So consider
12 this evidence, ladies and gentlemen, if you believe the
13 testimony of Lief and if you find that Phillips did make
14 false statements to him in an attempt to exculpate himself.
15 You may consider that evidence as circumstantial evidence
16 from which you may infer consciousness of guilt on the part
17 of Mr. Phillips. In other words, again on this question of
18 criminal intent, but of course you consider this evidence
19 only with respect to Mr. Phillips and not with respect to
20 Mr. Cohen.

21 In considering the evidence which you have heard,
22 ladies and gentlemen, bear in mind that there are two types
23 of evidence, direct evidence and circumstantial evidence.
24 Direct evidence is testimony of a witness who personally
25 observed a transaction or participated in the activity which

1 rgcg 16

2 he is describing. Circumstantial evidence consists of
3 circumstances from which the jury may infer by a process of
4 reasoning certain facts which are sought to be established
5 as true. A classic example of circumstantial evidence is
6 if in the last couple of days when we had all this rain any
7 of you went home to your house or apartment and went in there
8 and somebody was watching TV in the apartment and they looked
9 at you and they saw that your coat was wet and had was wet,
10 they would say it is raining outside. Now, they didn't look
11 outside, they looked at you and looking at you and seeing the
12 wet hat and raincoat, by a process of reasoning they figured
13 that it is raining outside. Well, that is circumstantial
14 evidence and of course there was circumstantial evidence in
15 this case about the various events that took place on April
16 24. Both direct evidence and circumstantial evidence are
17 good evidence and no greater degree of certainty is required
18 when the evidence is circumstantial than when it is direct,
19 but in either case, you, the jury, must be convinced of the
20 guilt of the defendant beyond a reasonable doubt and of
21 course different inferences may be drawn from the evidence,
22 whether it is direct or circumstantial. The government
23 would ask you to draw one set of inferences while the
24 defendant would ask you to draw another, and of course it is
25 for you, the jury, alone to determine what inferences you

1 rgcg 17

2 will draw and what facts you find to have been proven, but
3 remember that any inferences you draw must be reasonable
4 inferences based on the evidence or lack of evidence.

5 Now, you, the jury, of course are the exclusive
6 judges of the credibility of the witnesses who appeared be-
7 fore you, and certainly that was discussed at great length
8 by the lawyers yesterday. I know you gave each of these
9 witnesses your careful attention. You will subject the
10 testimony of all these witnesses to the same standards whether
11 they were called by the government or by the defendants, and
12 it is not the quantity of the testimony, it is the quality
13 of the testimony. It is the testimony that you believe is
14 most likely to represent a true picture of what happened on
15 this occasion.

16 How do you determine whether you think these
17 witnesses were credible? Well, here again, ladies and
18 gentlemen, please use your plain every day common sense.
19 You saw them and observed them. How did they impress you?
20 Did you think they were testifying frankly, candidly, fairly?
21 So again apply your common sense and experience just as you
22 were called on to do in determining an important matter in
23 your own lives when you have to decide whether you have been
24 given a true picture of a given situation.

4 25 I think you would consider a witness' demeanor,

1 rgcq 18

2 you would take into account background, his occupation or
3 business, his prior criminal record if he has one. You
4 consider the witness' candor or lack of it, the witness'
5 possible bias, the accuracy of his recollection and would
6 consider whether you find that a witness' testimony is
7 supported or whether you find it to be contradicted by other
8 credible testimony or circumstances.

9 You will consider whether a witness has an in-
10 terest to be served in testifying, for sometimes where a
11 witness has an interest he may be tempted to color his
12 testimony or perhaps withhold a fact. Remember during the
13 trial we had I think three FBI agents, Good, Kelly and
14 Pistone. They are law enforcement agents. They have an
15 interest in prosecuting people who they think have violated
16 the law. Well, that is an interest which you should con-
17 sider, of course. It doesn't mean that any witness will
18 falsify if he has an interest, it is purely a fact for which
19 you, the jury, may consider.

20 Here, of course, both the defendants, Mr. Cohen
21 and Mr. Phillips, took the stand and testified. They didn't
22 have to. They testified voluntarily. Now, of course each of
23 them has a vital interest in the outcome of this case and
24 his interest is something which you should consider carefully.
25 Here again you may conclude that the defendant is telling the

1 rgcg 19

2 complete truth despite his interest in the outcome, but you
3 should consider a defendant's testimony with great care.

4 Then Marvin Gelber testified. He told us about
5 this arrangement he said he had with the defendants. In
6 effect he was an accomplice in this thing. He said he
7 plead guilty, I think, and he told us he had been given
8 immunity if he would testify, so he really is in the posture
9 of an accomplice. You should consider his testimony with
10 great care and the need is especially great if you find that
11 his testimony is not corroborated by any evidence. His
12 testimony should be given such value and weight as you deem
13 proper under the circumstances and his testimony by itself
14 is sufficient to convict if you believe it and it convinces
15 you of the defendants guilt beyond a reasonable doubt.
16 However, bear in mind that in considering Gelber's testimony
17 you should take into account any motive you think he had
18 in testifying the way he did and you should subject his
19 testimony to great care.

20 A witness may be discredited or impeached by
21 contradictory evidence or by evidence that on other occasions
22 he made statements which are inconsistent with the testimony
23 he gave at the trial and if you find any witness has been
24 impeached or discredited it is your exclusive province to
25 give that witness such credibility as you think he deserves.

1 rgcg 20

2 If you think a witness lied to you concerning any matter you
3 may reject all the testimony of that witness or you can accept
4 part of it if you find it credible and you may discard the
5 rest.

6 During your deliberations you have a right to see
7 any of the exhibits which have been received in evidence.
8 If you want any of them just let me know by telling the
9 marshall.

10 As you deliberate, ladies and gentlemen, remember
11 that a jury deliberation is one in which everybody expresses
12 their views and exchanges views. Please don't be afraid to
13 change your original view because of pride of opinion or
14 stubbornness or any reason at all should you find that your
15 original view was wrong, but on the other hand, ladies and
16 gentlemen, never surrender your honest conviction. Never do
17 that. Never surrender it because you may be out-voted or
18 for any other reason at all.

19 You will seek to arrive a verdict here consistent
20 with the conscientious convictions of each and every one of
21 you. It is obviously very important to both the government
22 and to each of these defendants that this case be decided
23 by you. Your verdict must be a unanimous verdict representing
24 the conscientious convictions of each of you.

25 If you find after reviewing the evidence that the

1 rjcg 21

2 defendant you are considering is not guilty please don't
3 hesitate for any reason to render a verdict of not guilty,
4 but on the other hand if you find that the defendant has
5 violated the law as charged, that he is guilty, you must not
6 hesitate to render a verdict of guilty because of sympathy or
7 any other reason at all.

8 Please do not consider the possible punishment
9 that a defendant might receive in case you find him guilty.
10 Please don't let this enter into your deliberations in any
11 way at all. The duty of imposing sentence rests on the
12 Court and you must not allow consideration of possible
13 punishment affect you or make you seek to avoid the performance
14 of an unpleasant task.

15 In conclusion, ladies and gentlemen, I am sure
16 that if you listen to the views of your fellow jurors and if
17 you apply your common sense you will reach a fair verdict
18 here. I remind you again that your verdict must be rendered
19 without fear, without favor, without prejudice and without
20 sympathy.

21 Will counsel come forward a minute, please.

22 (At the side bar.)

23 THE COURT: Mr. Klempner?

24 MR. KLEMPNER: I confess I did not hear your
25 Honor say that the verdict must be unanimous, but I am sure

